

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT FRANKLYN PAYTON,

Defendant-Appellant.

UNPUBLISHED

August 22, 2006

No. 260302

Lapeer Circuit Court

LC No. 04-008041-FH

Before: Saad, P.J., and Jansen and White, JJ.

WHITE, J. (*concurring*).

After a review of the record, I am satisfied that the jury was properly instructed and that the court's actions in giving the packet of written instructions to the jury without first permitting counsel to review the packet, although error, was harmless. After the jurors requested the elements of the offenses, the court informed them to rely on their collective memories, and that if they needed the instructions read back in the future that could be done. The jurors then informed the court that they were not close to a verdict. The court informed the prosecutor and defense counsel that it would call the jurors in and excuse them for the weekend. The court and counsel discussed the logistics for Monday morning. The court stated it would instruct the jury upon arrival that it should continue with deliberations, but counsel needed to be available upon fifteen minutes notice. The prosecutor brought up the possibility of providing written instructions. The court asked whether there was an agreement to give the jury written instructions covering only the elements of the offenses. Defense counsel stated that he was not in agreement. The prosecutor began to ask a question that was most likely directed to whether defense counsel would agree to give a full copy of the instructions to the jury, but was interrupted by the court's statement that "If they make that request again Monday then I'll bring you back in and we'll discuss it." Defense counsel responded "Okay."

On Monday morning, the court informed the attorneys, in chambers and not on the record, that the jury had again asked for instructions on the elements and had been given a complete set of written instructions. There is no indication that defense counsel objected at that point, and indeed, no objection would have been warranted. Additionally, there is no indication that defense counsel asked to see a copy of the instructions given. Certainly, any concern about the form and clarity of the printed and handwritten instructions could have been addressed at that time, had counsel viewed the instructions at that time.

A review of the written instructions submitted to the jury shows that there are many parts within the instructions where there are handwritten modifications and additions. Under these circumstances, I reject defendant's argument that the jury likely did not understand that it could not find defendant guilty of reckless discharge of a firearm unless it determined that he did not act in self-defense. There is no reason, other than the acquittal of the charge of felonious assault, to believe that the jury was confused. However, the fact that the jury inquired what was the effect of a non-unanimous verdict on a count, and further inquired whether count II was a felony, shows that it is just as likely that the verdict was the result of a compromise. In any event, I conclude that although the court erred in giving the instructions to the jury without "bringing [counsel] back in [to] discuss it," and without permitting counsel to view them beforehand, the error was harmless.

/s/ Helene N. White